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No. A-78

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EDWARD LEROY LECK, *Petitioner*

vs.

KENNETH PUGH and CLEBURNE NATIONAL BANK, *Respondents*

Petition for Writ of Certiorari to the Texas Supreme Court

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QUESTIONS PRESENTED

I. Was Petitioner denied "equal protection" of the law as guaranteed by Article 14 of the United States Constitution by the State Appellate Court's rulings that A National Bank in Cleburne, Texas, owed "no duty" to Petitioner to "properly administer" the Bank's loan records of Petitioner's Company which had been personally guaranteed by him.

II. Was Petitioner denied "due process" of the law as guaranteed by Article 14 ot the United States Constitution by the State Appellate Court's holding ot "res adjudicata" on a second trial jury verdict which had at issue different parties and subject matter than was at issue in the first jury trial verdict.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. A-78

EDWARD LEROY LECK, *Petitioner*

vs.

KENNETH PUGH and
CLEBURNE NATIONAL BANK, *Respondents*

Petition for a Writ of Certiorari to the Texas Supreme Court

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Edward Leroy Leck, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Texas Supreme Court entered in the above-entitled case on April 29, 1981.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas reported at 604 S.W.2d 283 and is printed in Appendix "A" hereto. The Texas Supreme Court's refusal to grant a Writ of Error

application challenging the said Court of Civil Appeals decision is printed in Appendix "B" hereto. The Texas Supreme Court's refusal to grant Petitioner's Motion for Rehearing is printed in Appendix "C" hereto.

JURISDICTION

The judgment of the Texas Court of Civil Appeals (Appendix "A") was entered on June 30, 1980. A timely Application for Rehearing was denied on August 7, 1980. The Texas Supreme Court refused to grant Petitioner's Motion for Rehearing on April 29, 1981 (Appendix "C"), after previously denying Application for Writ of Error.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1257, (3), due to Petitioner's contentions below that certain basic rights guaranteed under the United States Constitution have been violated or refused to him because of the State appellate court decisions in this case.

QUESTIONS PRESENTED

This case involves whether Petitioner has been deprived of his right to "due process" and/or "equal protection" as guaranteed by the United States Constitution in Article 14.

The State appellate courts in this case have in effect held that the Cleburne National Bank, one of the Respondents, owed "no duty" to Edward Leroy Leck (who was a customer and guarantor of various promissory notes payable to said Bank, which became the subject of this litigation) to "properly administer" the Bank's records pertaining to the loans made to Petitioner's company and personally guaranteed by him. Leck was thereby denied equal protection.

The State appellate courts further found that an earlier trial between these parties was "res adjudicata," when in fact, different parties and subject matter were in issue at the second trial and a holding of res adjudicata in effect denied Petitioner due process.

STATEMENT

This case was one of first impression in Texas, without precedent, and involved an unusual set of facts. No decision in Texas to date has confronted the pressing issues of "duty" and "res judicata" as were raised in this case.

The basic facts of this case are that Petitioner was an equal shareholder in a Texas corporation known as Kenedco, Inc., along with the other Respondent, Kenneth Pugh. The testimony upon both trials clearly showed that the Cleburne National Bank was the "floor plan" financing institution for the inventory of Kenedco, Inc.'s retail boat sales outlet, known as Ken Lee Marine Store. Respondent, Kenneth Pugh, was the general manager of the Ken Lee Marine Store. Pugh admitted during the trial that he intentionally concealed from his equal shareholder (Petitioner) the fact that over $30,000 of the marine store inventory was missing and unaccounted for. This missing inventory was part of the "floor plan" collateral pledged at the Respondent Bank. The evidence during the two trials and the two jury verdicts returned in the separate trials, established that the Bank officers had fraudulently helped Pugh conceal the shortage (first trial) and had at least been grossly negligent in administering their "floor plan" financing arrangements with Petitioner (second trial).

Petitioner, on behalf of the corporation, was not allowed to assert any claim for damages to the corporation at the first trial (Cause No. 846-73) due to a corpo-

rate deadlock and his lack of authority to sue for damages to corporate (Kenedco, Inc.) stock caused by the Bank and Pugh. At the second trial in Cause No. 124-75, (after an earlier reversal and rendition against Leck by the Texas Court of Civil Appeals in Cause No. 846-73) Leck was allowed to sue for damages to his stock equity proximately caused by Pugh and the Bank, and the jury awarded money damages which were again reversed and rendered against Petitioner, but this time on grounds of "no duty" owed to him by the Bank and a "res judicata" finding on the issues of liability because of the first trial reversal and rendition in Cause No. 846-73.

Petitioner contends that res judicata does not attach because:

(1) The damages in issue in the second trial did not even exist at the time of the first trial, and furthermore,

(2) The damages to his corporate stock equity interest had never been litigated,

(3) He has, therefore, been deprived of due process by law by the second trial reversal and affirmation by the Texas appellate courts which has in effect deprived and denied him his "day in court" to assert his claim for damages.

The appellate courts in Texas have in effect deprived Petitioner of a valuable property right, (i.e.) his claim for money damages, and such a property right is within the broad meaning of "property" as set forth in Article 14, U. S. Constitution. see *Perry v. Sinderman*, 408 U.S. 593 (1972).

Petitioner's claim for damages to his corporate stock equity was not litigated in the first trial. The damages found by the jury in the second trial were for the most

part damages that accrued after the first trial was finished and before the second trial started.

This Court has spoken on similar cases such as *Stark v. Stare*, 94 U.S. 477 (1876), where it held that "Plaintiffs in one suit cannot be barred by what was *not determined* in another, unless there was laches or negligence on the part of plaintiff in the former suit." There certainly was no laches or negligence on Petitioner's part in this case. See also *Yates v. Utica Bank*, 206 U.S. 181 (1907); *U.S. v. International Bldg. Co.*, 345 U.S. 502 (1953); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955).

A state court's judgment in a money damage suit is within the meaning of the "equal protection" clause, for this Court's review, if a question of denial of equal protection by the state court decision has been raised.

The Texas Court of Civil Appeals on the second appeal decided that the Respondent Bank owed "no duty" to Petitioner to properly administer its floor plan financing arrangements. Such a holding in effect sets up a "suspect classification" as far as banks are concerned, since it is a common law doctrine in this country that all persons are responsible to exercise ordinary care in their contractual dealings with other persons.

The relationship between a bank and its customers, such as Petitioner, is tantamount to a fiduciary relationship and under the Uniform Commercial Code, a requirement of "good faith" in the transactions involved is required. A jury find of "gross negligence," as was the finding of the jury in the second trial against Pugh and the Bank, is certainly sufficient to show a violation of the good faith requirement between the parties. For the Texas appellate courts to adopt a different view is, in

effect, to classify banks as specially protected from their acts of misfeasance or malfeasance. See *Missouri v. Canada*, 305 U.S. 377 (1938).

The appellate court's decision in the first appeal is reported in 547 S.W.2d 67, writ refused, n.r.e. 1977, a copy of which is attached as Appendix "D."

REASONS FOR GRANTING THIS WRIT

Therefore, due to the obvious denial to Petitioner of his day in court (by denial of his damages on grounds of res judicata) which violates his right to due process of the law, and furthermore, because of the Texas appellate court's creation of a special classification (or tort immunity) of certain banking activities as compared to the liabilities of the general public for their acts, Petitioner's right to equal protection of the laws has been violated by State action.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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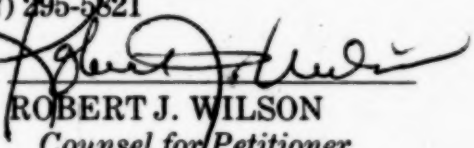
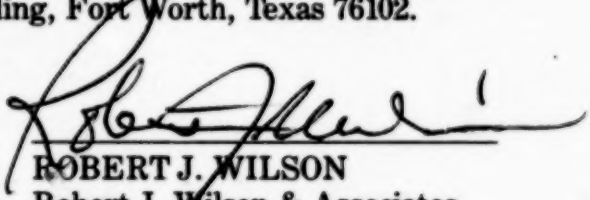
By: 

ROBERT J. WILSON
Counsel for Petitioner
September 25, 1981

CERTIFICATE OF SERVICE

I, Robert J. Wilson, attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on September 23, 1981, I served a copy of the foregoing Petition for a Writ of Certiorari on Respondents herein, by mailing a copy in a dully addressed envelope, with first class postage prepaid, to Robert A. Sparks, P.O. Box 626, Cleburne, Texas 76031, David B. Anderson, P.O. Box 486, Cleburne, Texas 76031, Dick Turner, 101 East Henderson, Cleburne, Texas 76031, and Sloan B. Blair, 1800 First National Bank Building, Fort Worth, Texas 76102.



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APPENDIX "A"

Opinion of the Court of Civil Appeals, of June 30, 1980

The State of Texas

To the 249th Judicial Court of Johnson County, Greeting:

Before our Court of Civil Appeals on the 30th day of June A. D. 1980, the cause upon appeal to revise or reverse your judgment between

Kenneth Pugh, et al, Appellant,

and

Edward Leroy Leck, Appellee,

No. 6134

was determined; and therein our said Court of Civil Appeals made its order in these words:

"Came on to be heard on the transcript of the record in Cause No. 6134 entitled Kenneth Pugh, et al, Appellants, vs. Edward Leroy Leck, Appellee, from the 249th Judicial District Court of Johnson County, Texas; and the same being considered, it is the opinion of the Court there is error in the judgment; it is therefore ordered, adjudged and decreed that the judgment of the trial court entered the 12th day of July, 1979, be, and hereby is, REVERSED and judgment is here RENDERED that Appellee, Edward Leroy Leck, take nothing by his suit. It is further ordered that the Appellee, Edward Leroy Leck, pay all costs in this behalf expended both in this Court and the court below, and this decision be certified below for observance. Opinion by Chief Justice Frank G. McDonald."

Wherefore we command you to observe the order of our said Court of Civil Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Hon. Frank G. McDonald, Chief Justice of our said Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, with the seal thereof annexed, at the City of Waco, this 8th day of May A. D. 1981.

/s/ Robert G. Watts, Clerk
Robert G. Watts

By: _____ Deputy

REVERSED & RENDERED 30 JUNE 1980

Trial Court
124-75 & 249-285-78
Consolidated

No. 6134

IN THE COURT OF CIVIL APPEALS
FOR THE TENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT WACO

KENNETH PUGH, ET AL, Appellants

v.

EDWARD LEROY LECK, Appellee

From 249th Judicial District
Court, Johnson County, Texas

OPINION

This is an appeal by defendants Cleburne National Bank and Edward Pugh from judgments against them of $69,716.31 and $29,878.42 in favor of plaintiff Edward Leroy Leck.

Plaintiff Leck's trial pleading (3rd Amended Petition) alleges that he brings this cause of action individually and as a stockholder of Kenedco, Inc.; that he owns 50%, and defendant Pugh owns 50% of the stock of Kenedco and are the Directors; that heretofore Bank sued Kenedco and plaintiff and Pugh as guarantors on notes owed by Kenedco to Bank; that Bank had been guilty of fraud, conspiracy to defraud, negligence and impairment of collateral; that he tried to get the Directors to defend the Bank's suit against Kenedco and authorize suit by Kenedco against the Bank; that Pugh refused, thus preventing Kenedco from defending Bank's suit or suing Bank; that Kenedco owned Cleburne Muffler Shop which plaintiff managed, and Ken Lee Marine which Pugh managed; that Bank financed the Ken Lee Marine building; as well as the inventory of boats and motors under a "floor plan" arrangement; that Bank and Pugh made misrepresentations concerning the inventory and solvency of Ken Lee Marine; that Bank mismanaged the "floor plan"; that Pugh failed to pay notes when inventory was sold; that large shortages developed in the inventory; that Bank and Pugh knew this but furnished false information to plaintiff concerning same; that plaintiff relied on such representation to his detriment as a personal guarantor of the debts of Kenedco; that Bank and Pugh conspired to misrepresent to plaintiff; and auditors and accountants; that Bank and Pugh were negligent in a

number of particulars in administering the "floor plan" and in allowing missing items to be counted in inventory checks; that defendants' misdeeds caused Ken Lee Marine to be placed in Receivership and caused Kenedco to file bankruptcy proceedings; that all of the foregoing caused damages to plaintiff in 10 specified areas through diminishment of the value of his stock. Plaintiff alternatively plead that jury findings in the prior case[1] finding Pugh and Bank guilty of fraud, conspiracy to defraud, negligence and gross negligence have settled the fact issues in the case.

Both Pugh and Bank filed pleasa in abatement asserting that the former case conclusively settled all claims asserted by Leck and that the judgment in such case operates as res judicata barring such claims. The trial court overruled such pleas.

Trial was to a jury which found:

1) Bank and Pugh did not enter into a conspiracy to defraud.

2) Bank did not make false representations to Leck.

3) Pugh did not make false representations to Leck.

4) Bank failed to properly administer the floor plan to insure proper accounting by Ken Lee Marine for the existence of all items pledged as security for the floor plan notes, which was negligence, and a proximate cause of damage to Leck.

5) Pugh failed to administer the floor plan to insure proper accounting by Ken Lee Marine for the existence of all inventory items pledged as security for

[1]Cleburne National Bank v. Kenedco, Inc., et al CCA (Waco) NRE, 547 S.W.2d 67.

the floor plan notes, which was negligence, and a proximate cause of damage to Leck.

6) Leck was damaged individually (not taking into consideration any damage to Kenedco, Inc.) a) $4000. loss of inventory; b) $11,320.11 payment of receiver's fees and expenses; c) $1,685.62 payment receiver's attorney's fee; d) $10,939. loss of intercompany account; e) $2,650. payment of accountant and witness fees; f) $6,000. payment of bankruptcy expense; g) $63,000. loss caused by bankruptcy sale of Ken Lee Marine.

7) The Bank's negligence caused 70% of such damage ($69,716.31); and Pugh's negligence caused 30% of such damage ($29,878.42).

The trial court rendered judgment on the verdict for Leck for $69,716.31 against Bank, and $29,878.42 against Pugh.

Pugh and Bank appeal contending the trial court erred in rendering judgment against them and in favor of plaintiff Leck, because the final judgment in the former case is res judicata of, creates estoppel by judgment, and constitutes a bar to the causes of action asserted by Leck in this case.

The record of the former case is before us. It reflects Leck and Pugh were the only shareholders and directors (each owning 50% of the stock) of Kenedco, Inc. Through Kenedco, Leck and Pugh operated Ken Lee Marine, selling boats and motors, and Cleburne Muffler Shop, selling mufflers. Pugh managed Ken Lee and Leck managed the Muffler Shop. Cleburne Bank financed the inventory of Ken Lee for Kenedco under a "floor plan" whereby Ken Lee executed notes and security agreements as items of inventory were purchased, and paid the note as the item

securing it was sold. Bank's loans to Kenedco were also secured by the personal guarantees of Pugh and Leck. Also Bank held a note secured by deed of trust lien on land owned by Kenedco. In November 1973 Bank sued Kenedco, Leck and Pugh for $77,496.62 on floor plan notes, and for $27,943.96 due on the land note.

Thereafter Leck caused suit to be filed against Bank and Pugh on behalf of Kenedco, Inc., and Leck individually; later amended such to sue as Leck individually "and to protect the interest of Kenedco, Inc."

Bank filed motion under Rule 12 TRCP for plaintiffs' (Kenedco and Leck) attorneys to show cause for authority to prosecute such suit, and the trial court entered order holding plaintiffs' attorneys failed to show authority to represent Kenedco and dismissed Kenedco from the case.

Thereafter, Leck filed amended pleadings individually alleging (he had tried without success to get Kenedco, Inc. to file such suit, had filed same himself for the corporation but that the trial court had dismissed the corporation); that Bank and Pugh conspired to impair and fraudulently and negligently did impair the collateral for notes by disposing of inventory without payment to Ken Lee, by failing to see that notes were paid as inventory was disposed, and by false inventory checks and reports; that as result of such activities he has been caused to suffer damages by reason of his personal liability for Kenedco's debt to Bank of $107,496., and for $40,000. consequential damages for expenses relating to the corporation, damages to his credit standing, and damages to his personal estate, (and plead for exemplary damages).

Bank's case on the notes and this case were consolidated by the trial court. Thereafter the court appointed a receiver to take charge of Kenedco's assets.

Trial was to a jury. No issues were submitted relating to the Bank's action on the notes. The jury made a number of findings of conspiracy, fraud, and negligence against Bank and Pugh in support of Leck's contentions of impairment of the note's collateral by them. (The jury awarded Leck: 1) $100,000. for his personal liability on the debts of Kenedco to Bank; 2) "None" for injury to his credit standing; and 3) "None" for injuries to his personal estate; and 4) $50,000. for exemplary damages each against Bank and Pugh.

The judgment recited that all indebtedness of Kenedco, Inc., to Bank had been settled subsequent to the jury's verdict and decreed Bank recovery nothing from Kenedco, Leck or Pugh; but decreed Leck recover $100,000. against Bank and Pugh for actual damages and $50,000. against Bank and Pugh each for exemplary damages.

This court held on appeal that Leck's recovery of $100,000. for his personal liability for the debt of Kenedco was defensive and could only reduce any recovery by Bank and will not support an affirmative recovery by Leck; that Leck recovered nothing in his other items of damages submitted to the jury; that absent actual damages the exemplary damages are not recoverable; and reversed the judgment against Bank and Pugh and rendered judgment Leck take nothing.

It was after verdict in the former case (but before judgment was rendered) that Leck filed the instant case. In the former case Leck sought his individual damages; in the instant case Leck sought his individual damages.

Thus, the parties in the instant case are the same as the parties in the prior case; as are the identity of issues and causes of action. The final judgment in the prior case that Leck take nothing is res judicata to the instant case.

As this court held in Mitchell v. Carter, CCA (Waco) NWH, 545 S.W.2d 869:

> Res judicata is the doctrine that a right, question of fact, put in issue and determined by a court of competent jurisdiction cannot be further litigated in a subsequent suit between the same parties or their privies. Davis v. First National Bank of Waco, 139 Tex. 36, 161 S.W.2d 467. The Rule of Res Judicata bars litigation of all issues connected with a cause of action or defense which, with use of diligence, might have been tried in a former case, as well as those which were actually tried. Ogletree v. Crates, S.Ct., 363 S.W.2d 431. And the rules of res judicata rest upon the policy of protecting a party from being twice vexed for the same cause, together with that of achieving judicial economy in precluding a party who has had a fair trial from relitigating the same issue. Benson v. Wanda Petroleum Co., S.Ct., 468 S.W.2d 361.
>
> Bank's and Pugh's contention supra is sustained.

Additionally the findings of negligence and proximate cause found against the Bank in connection with the finding Bank failed to properly administer the floor plan, cannot support a judgment in favor of Leck against the Bank, since the Bank owed no duty as to Leck to properly administer the floor plan to insure proper accounting.

The judgment of the trial court is reversed and judgment here rendered Leck take nothing.

FRANK G. McDONALD
Chief Justice

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Burleson, Texas

APPENDIX "B"

Refusal of Texas Supreme Court to grant Writ of Error, February 25, 1981

Clerk's Office – Supreme Court

Austin, Texas

Feb. 25, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of LECK v. PUGH ET AL., No. B-9775 was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX "C"

Refusal of Texas Supreme Court of Motion for Rehearing, April 29, 1981

Clerk's Office – Supreme Court

Austin, Texas

Apr. 29, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B-9775: Edward Leroy Leck vs. Kenneth Pugh et al. was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX "D"

Opinion of Court of Civil Appeals, of 1977

CLEBURNE NATIONAL BANK, Cleburne, Texas, et al., Appellants,

v.

KENEDCO, INC., et al., Appellees.

No. 5595.

Court of Civil Appeals of Texas,

Waco,

Feb. 10, 1977.

Rehearing Denied March 10, 1977.

Lender brought suit against borrowers to collect on notes and for foreclosure of security interest and deed of trust lien. One borrower subsequently brought suit against lender and the other borrower alleging that they conspired to impair and fraudulently and negligently did impair the collateral for the notes. Following consolidation of the cases, the 18th District Court, Johnson County, E. Byron Crosier, J., rendered judgment that the lender take nothing, but awarded the borrower $100,000 for his liability for the indebtedness on the notes and awarded him $50,000 in exemplary damages. Lender and other borrower appealed. The Court of Civil Appeals, Hall, J., held that where the borrower pleaded impairment of collateral by the lender and the other borrower and sought relief to the extent that this impairment affected his liability on the notes, the issue was defensive, could only serve to diminish or defeat the

lender's recovery against the borrower and could only serve to indemnify the borrower against the other borrower for what he might be required to pay the lender on the note; and that absent actual damages the borrower could not recover exemplary damages.

Affirmed in part; reversed and rendered in part.

1. Bills and Notes [Key]452(1)

Where borrower being sued on notes pleaded impairment of collateral by lender and another borrower and sought relief to extent that this impairment affected his liability on notes, issue was defensive, could only serve to diminish or defeat lender's recovery against borrower, and could only serve to indemnify borrower from other borrower for what borrower might be required to pay lender on notes. V.T.C.A., Bus. & C. § 3.606.

2. Damages [Key]87(2)

Without actual damages, plaintiff could not recover exemplary damages.

Gean B. Turner, Turner, Turner & Turner, Anderson & Anderson, Cleburne, Sloan B. Blair, Cantey, Hanger, Gooch, Cravens & Munn, Paul C. Cook, Ft. Worth, for appellants.

Earl Rutledge, Ft. Worth, Robert J. Wilson, Burleson, for appellees.

HALL, Justice.

At all pertinent times, Edward Leroy Leck and Kenneth Pugh were the only shareholders and directors (each owning 50% of the stock) of a Texas corporation known as Kenedco, Inc. Through Kenedco, Leck and Pugh operated a business known as Ken Lee Marine

Sales, selling boats, boat trailers, boat motors, and related marine products; and another business known as Cleburne Muffler Shop, selling mufflers and other automobile accessories. Pugh managed Ken Lee and Leck managed the muffler shop. Cleburne National Bank financed the inventory of Ken Lee for Kenedco under a system commonly known as "floor planning," whereby Ken Lee executed individual promissory notes and security agreements as items of inventory were purchased, and then paid the note involved as the item securing it was sold. Bank's loans to Kenedco were also secured by the written personal guaranties of Pugh and Leck. Additionally, Bank held a vendor's lien note executed by Kenedco, which was secured by a deed of trust lien on land owned by Kenedco. In November, 1973, Bank initiated suit against Kenedco, Leck, and Pugh to collect on floor-plan notes whose principal amounts totaled $77,496.62; to collect on the balance of the vendor's lien note in the amount of $27,943.96; and for interest, attorneys' fees, and foreclosure of its security interests and deed of trust lien.

Later, Leck brought suit against Bank and Pugh alleging in detail that Bank and Pugh conspired to impair and fraudulently and negligently did impair the collateral for the notes by disposing of inventory without proper payment to Ken Lee, by failing to see that Bank's floor-plan notes were paid as the inventory was disposed of, and by false inventory checks and reports. He pleaded that as a result of these activities he "has been caused to suffer damages by reason of his personal liability for Kenedco, Inc.'s indebtedness to Cleburne National Bank in a sum at least equal to the principal amount of all notes executed by such corporation to such Bank totaling $107,496.80," plus interest and attorneys' fees, "and for

$40,000.00 in consequential damages in the form of expenses relating to such corporation for which he may be adjudged liable to Kenedco, Inc.; for $150,000.00 for damages to his credit standing; for $25,000.00 damages to his personal estate in the event he is held personally liable for the corporation's said indebtedness to Cleburne National Bank"; and for exemplary damages totaling $3,500,000.00. He prayed for judgment "for his damages as are above set forth."

The cases were consolidated. Thereafter, the court appointed Joseph M. Coffey, Jr., Receiver to take charge of Kenedco's assets.

CLEBURNE NAT. BANK v. KENEDCO, INC.
Cite as 547 S.W.2d 67

The trial was to a jury. No issues were submitted to it relating affirmatively to Bank's action on the notes. However, the jury made a number of findings of conspiracy, fraud, and negligence against Bank and Pugh in support of Leck's contentions of impairment of the notes' collateral by them. The jury then made the following answers to the damage issues submitted on behalf of Leck:

No. 48a: $100,000.00, "For his personal liability for the indebtedness of Kenedco, Inc.";
No. 48b: None, "For injury to his credit standing";
No. 48c: None, "For injuries to his personal estate";
No. 49: $50,000.00 for exemplary damages against Bank; and
No. 50: $50,000.00 for exemplary damages against Pugh.

Based upon these findings, judgment was rendered awarding Leck an affirmative recovery of $100,000.00

against Bank and Pugh, jointly and severally, for actual damages; and $50,000.00 against Bank and Pugh, each separately, for exemplary damages.

The judgment contains these additional recitations:

> "It further appearing to the Court from the Report of the Receiver, Joseph M. Coffey, Jr., on file herein, and from the representations of counsel for Cleburne National Bank, Edward Leroy Leck, and Kenedco, Inc., that all alleged indebtedness of Kenedco, Inc., to Cleburne National Bank has been settled and compromised subsequent to the return of the jury's verdict;
>
> "IT IS THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED that Cleburne National Bank recover nothing of or from Kenedco, Inc., Edward Leroy Leck, or Kenneth Pugh by this suit."

This recitation of settlement and the take-nothing judgment based upon it against Bank are not challenged by any party.

Bank and Pugh appeal. Among other grounds for reversal they assert that the jury's answer to special issue 48a (awarding Leck $100,000.00 for his personal liability for the indebtedness of Kenedco) is defensive in nature, can serve only to reduce Leck's liability for any recovery by Bank against Kenedco, and will not support an affirmative recovery in favor of Leck against them; and that in view of the take-nothing judgment against Bank in favor of Kenedco, Leck is not entitled to any relief based on this finding. Additionally, they say that because the jury failed to find (in answers to issues 48b and 48c) that Leck suffered any actual damages, he is not entitled to exemplary damages. Responding, Leck says

his right to recover the $100,000.00 awarded by the jury cannot be prejudiced by activity *after* the verdict. We agree with Bank and Pugh.

V.T.C.A., Bus. & C. § 3.606 provides in pertinent part that the holder of a note "discharges any party to the instrument to the extent that without such party's consent the holder . . . unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

[1] Leck pleaded impairment of collateral by Bank and Pugh, each individually and in concert with the other. He sought relief to the extent this impairment affected his liability on behalf of Kenedco. Special Issue 48a submitted this question to the jury. As to Bank, this issue was plainly defensive, and could only serve to diminish or defeat Bank's recovery against Leck in keeping with the provisions of V.T.C.A., Bus. & C § 3.606, supra. As to Pugh, it could only serve to indemnify Leck for what he might be required to pay Bank on behalf of Kenedco. It does not submit a question related to independent, affirmative relief for damages. Without indebtedness to Bank by Kenedco the issue and its answer are immaterial and will not support a judgment in favor of Leck. At the time of judgment, Kenedco was not indebted to Bank. Accordingly, Leck was not entitled to relief on the basis of the jury's answer to issue 48a.

[2] The jury responded "none" in answer to Leck's only affirmative issues for damages. Without actual damages, a plaintiff may not recover exemplary damages in Texas. *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397, 409 (1934).

The judgment in favor of Leck against Bank and Pugh is reversed and judgment is rendered that he take noth-

ing against them. In all other respects, the judgment is affirmed.

The costs of this appeal are assessed against Leck.